SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES EDWARD D'AUGUSTE** **PART** **IAS MOTION 55EFM**

Justice

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GINARTE GALLARDO GONZALEZ & WINOGRAD, LLP,

Plaintiff,

- v -

WILLIAM SCHWITZER, WILLIAM SCHWITZER & ASSOCIATES, P.C.,GIOVANNI MERLINO, BARRY SEMEL-WEINSTEIN, BETH DIAMOND, RENE GARCIA, THE GARCIA LAW FIRM, P.C.,MIGNOLIA PENA, JANILDA GOMEZ

Defendant.

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INDEX NO. 159991/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 33, 35, 36, 37, 38, 39, 40, 41, 49, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 135, 136, 137, 138, 139, 140, 143, 145

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion is decided in accordance with the accompanying Decision and Order.

11/4/2019
DATE

JAMES EDWARD D'AUGUSTE, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 55

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GINARTE GALLARDO GONZALEZ & WINOGRAD, LLP, DECISION AND ORDER

Plaintiff, Index No. 159991/2018

- against -

WILLIAM SCHWITZER, WILLIAM SCHWITZER & ASSOCIATES, P.C., GIOVANNI C. MERLINO, BARRY AARON SEMEL-WEINSTEIN, BETH MICHELLE DIAMOND, RENE G. GARCIA, THE GARCIA LAW FIRM, P.C., MIGNOLIA PENA, AND JANILDA GOMEZ,

Defendants.

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JAMES E. D'AUGUSTE, J.:

Motion sequence nos. 001, 002 and 003 are consolidated for disposition herein.

In motion sequence no. 001, defendants William Schwitzer (Schwitzer), William Schwitzer & Associates, P.C. (the Schwitzer Firm), Giovanni C. Merlino (Merlino), Barry Aaron Semel-Weinstein (Semel-Weinstein) and Beth Michael Diamond (Diamond) (collectively, the Schwitzer Defendants) move, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint against them. Plaintiff Ginarte Gallardo Gonzalez & Winograd, LLP cross-moves, pursuant to CPLR 3211 (a) (7), for an order dismissing the counterclaim and the claim for punitive damages asserted by the Schwitzer Defendants.

In motion sequence no. 002, defendants Rene G. Garcia (Garcia) and The Garcia Law Firm (the Garcia Firm) (together, the Garcia Defendants) move, pursuant to CPLR 3211 (a) (7), for dismissal of the complaint against them.

In motion sequence no. 003, defendants Mignolia Pena (Pena) and Janilda Gomez (Gomez) (together, the Individual Defendants) move, pursuant to CPLR 3211 (a) (7), for dismissal of the complaint against them.

BACKGROUND

This action arises out of the alleged poaching of clients from plaintiff law firm. According to the complaint, plaintiff is a personal injury law firm with offices in New York and New Jersey (NY St Cts Elec Filing [NYSCEF] Doc No. 22, affirmation of the Schwitzer Defendants' counsel, exhibit A [complaint], ¶¶ 1 and 5). Schwitzer is the principal of the Schwitzer Firm, a personal injury law firm in New York where Merlino, Semel-Weinstein and Diamond are employed as attorneys (*id.*, ¶¶ 6-10). Garcia is the principal of the Garcia Firm (*id.*, ¶ 11), which shares a business address with the Schwitzer Firm (*id.*, ¶ 33). It is alleged that the Schwitzer Firm employs Pena and Gomez as "case runners" (*id.*, ¶¶ 29-30).

The complaint alleges that beginning in June 2018, several of plaintiff's clients, all of whom had previously executed retainer agreements, substituted the Schwitzer Firm or the Garcia Firm for plaintiff (*id.*, ¶¶ 31-33). The complaint alleges that plaintiff had referred each of those clients to the same pain management specialist, "Dr. X," that defendants met with plaintiff's clients at or near Dr. X's office, and that defendants improperly solicited or enticed plaintiff's clients to substitute the Schwitzer Firm or the Garcia Firm as legal counsel (*id.*, ¶¶ 34-35). Pena and Gomez accompanied each client to the Schwitzer Firm's office, where they met with Schwitzer, Merlino, Semel-Weinstein, and Diamond (*id.*, ¶¶ 36-37). The complaint further alleges that defendants offered to pay each client $2,000 or $3,000, help them obtain financing for their cases, and arrange transport to and from their medical appointments as part of a concerted effort to persuade them to terminate their retainers with plaintiff (*id.*, ¶ 35). The complaint asserts that defendants purportedly told plaintiff's clients that plaintiff was ill-equipped or incompetent to handle their cases, that plaintiff was a "thief" or "the biggest thief," that plaintiff lied and stole its clients' money, and that plaintiff was the equivalent of "doctors that kill you" (*id.*).

Plaintiff commenced this action on September 19, 2018 by filing a summons and complaint asserting the following causes of action against each defendant: (1) tortious interference with contract; (2) violation of Judiciary Law § 487; (3) defamation; (4) unfair competition; (5) unjust enrichment; (6) violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC § 1961 *et seq.*); (7) civil conspiracy; and (8) an injunction permanently barring defendants from communicating with plaintiff's clients. Gomez and Pena, then appearing pro se, served answers to the complaint (NYSCEF Doc No. 56, affirmation of the Individual Defendants' counsel, exhibit B [Gomez answer]; NYSCEF Doc No. 57, affirmation of the Individual Defendants' counsel, exhibit C [Pena answer]). The Schwitzer Defendants interposed an answer with a counterclaim for defamation and seek punitive damages (NYSCEF Doc No. 62, affirmation of plaintiff's counsel, exhibit 1 [Schwitzer Defendants' answer], counterclaim ¶¶ 13-20). The counterclaim is predicated upon two newspaper articles, both of which discuss this lawsuit, published in the New York Post on October 30, 2018, and in the New York Law Journal on November 1, 2018 (*id.*, ¶¶ 8-9). The Garcia Defendants and plaintiff have moved for dismissal in lieu of serving an answer.

THE PARTIES' CONTENTIONS

On the present motions, defendants largely rely on the same arguments advanced by the Schwitzer Defendants in support of dismissal, as discussed *infra*.

Plaintiff opposes each application and argues that its submissions are sufficient to augment and cure any purported pleading deficiencies. It proffers affidavits from five current clients, all of whom attest that they were approached either by telephone or in person at a medical facility at 80 Maiden Lane by someone who wished to discuss whether they were represented by counsel. Four clients stated that the woman who had approached them expressly mentioned plaintiff and claimed

they would secure more favorable results if a different attorney represented them. The woman claimed plaintiff is a big firm but did not care about its clients (NYSCEF Doc No. 65, affirmation of plaintiff's counsel, exhibit 4 [Client no. 1 aff], ¶¶ 8-9), and called plaintiff "thieves because they settle your case for a lot of money … and tell you it settled for a lot less. This way, they can steal a great majority of the settlement money" (NYSCEF Doc No. 75, affirmation of plaintiff's counsel, exhibit 14 [Client no. 3 aff], ¶ 7; NYSCEF Doc No. 77, affirmation of plaintiff's counsel, exhibit 4 [Client no. 4 aff], ¶ 7). Two clients stated the woman told them to contact her at telephone number (347) 545-7625 if they wished to speak further (NYSCEF Doc No. 65, ¶ 14; NYSCEF Doc No. 79, affirmation of plaintiff's counsel, exhibit 18 [Client no. 5 aff], ¶ 8). When one client met with Diamond at the Switzer Firm's office, he heard Diamond say he would be given $2,000 in cash if he signed (NYSCEF Doc No. 70, affirmation of plaintiff's counsel, exhibit 9 [Client no. 2 aff], ¶¶ 6-7). Plaintiff submits executed copies of each affiant's retainer agreement.[1]

Two of plaintiff's employees, Juan Flores Hernandez (Hernandez) and Romeo Alvarado (Alvarado), aver that, while accompanying plaintiff's clients to their appointments at the Maiden Lane medical facility the week of October 22, 2018 and October 25, 2018, respectively, they were approached by "Mignolia," who stated that her daughter worked for an attorney with whom they could consult (NYSCEF Doc No. 72, affirmation of plaintiff's counsel, exhibit 11 [Hernandez aff], ¶¶ 6-7 and 10-11; NYSCEF Doc No. 74, affirmation of plaintiff's counsel, exhibit 12 [Alvarado aff], ¶¶ 3-4 and 6). Hernandez avers that when he first met Pena, she described plaintiff as "'scammers,' as 'robbers' who are 'just here to screw people, not help people,' and to 'steal money'" (NYSCEF Doc No. 72, ¶ 10). He states the woman told him he would be given $2,000 if he "signed up," and that Mignolia's daughter, "Jenny," would contact him later that day (*id.*, ¶¶

[1] Plaintiff redacted each affiant's name, address and signature on each affidavit and retainer agreement.

11 and 14). Hernandez further states that Jenny called him on his personal cell phone from telephone number (646) 302-1102, and that he recorded the conversation, the transcript of which is appended to his affidavit (*id.*, ¶¶ 16-18). On October 23, 2018, Jenny and Mignolia accompanied Hernandez in an Uber vehicle to a tenth-floor office at 820 Second Avenue where he observed a sign for the "Schwitzer" firm (*id.*, ¶ 21). He met with Semel-Weinstein, Merlino and a Spanish-language interpreter and recorded their meeting (*id.*, ¶¶ 22-24). A transcript of that meeting is annexed to his affidavit. Mignolia also contacted him from telephone number (347) 545-7625 on October 25, 2018, and offered him a cash payment of $3,000 once he "signed up with the Schwitzer firm" (*id.*, ¶ 27). Alvarado avers that Mignolia advised him to contact Jenny at (646) 302-1102 if he wished to refer anyone who had been involved in a construction accident, and that he would be paid $2,000 for each referral (NYSCEF Doc No. 74, ¶¶ 9 and 11). Annexed to Alvarado's affidavit is a color photograph Alvarado took of Mignolia on his cell phone (*id.* at 4). Records obtained from the Sprint Corporation show that telephone number (347) 545-7625 is registered to Pena (NYSCEF Doc No. 68, affirmation of plaintiff's counsel, exhibit 7 at 1), and that telephone number (646) 302-1102 is registered to Gomez (NYSCEF Doc No. 73, affirmation of plaintiff's counsel, exhibit 12 at 1).

Plaintiff also tenders a notarized handwritten statement from a former employee of the Schwitzer Firm.[2] The employee states that staff who accompanied clients to their medical appointments were encouraged to ask other patients at those offices if they were happy with their legal representation and to persuade them to switch firms (NYSCEF Doc No. 81, affirmation of plaintiff's counsel, exhibit 20 at 1). The employee states that clients were offered transportation and "quicker workman's compensation payments" (*id.* at 2-3). The employee further states that

[2] Plaintiff redacted the employee's name and signature along with names of others who were allegedly involved in the scheme.

"Mr. Schwitzer also employs runners that would go to accident scenes and sign up clients as well" (*id.* at 2). Another client terminated his retainer with plaintiff "because he received five thousand dollars up front" from Schwitzer (*id.* at 3). Schwitzer also kept a "briefcase in his office with a large amount of cash" which he used to "pay both clients and the runners" (*id.* at 4).

Additionally, plaintiff relies on excerpts from a disciplinary proceeding brought against William R. Hamel (Hamel), an attorney affiliated with Schwitzer's former law firm, Dinkes & Schwitzer (*see Matter of Hamel* (121 AD3d 332 [1st Dept 2014]). Hamel had been convicted of criminal facilitation in the fourth degree, which is a violation of Penal Law § 115.00 (1), for paying a hospital employee to disclose information about an injured patient who then became Hamel's personal injury client (*id.* at 333). Hamel explained that he and William Dinkes (Dinkes), one of the principals at the firm, paid hospital personnel in exchange for client referrals (NYSCEF Doc No. 82, affirmation of plaintiff's counsel, exhibit 21 [Hamel tr] at 34-41). Finally, plaintiff proffers copies of three consent-to-change attorney forms and letters of substitution for the Garcia Firm and one consent-to-change attorney form and letter of substitution for the Schwitzer Firm.[3]

DISCUSSION

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). A motion to dismiss will be denied "if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer*

[3] Plaintiff redacted names, dates of loss and index numbers from each document.

v Ginzburg, 43 NY2d 268, 275 [1977]). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). A pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom. Spiegel v Rowland*, 552 US 1257 [2008]).

Preliminarily, the Schwitzer Defendants object to plaintiff's submission of a 57-page memorandum of law, exclusive of the table of contents and table of authorities.[4] A memorandum of this length, filed without prior leave of court, contravenes the 30-page limit described in Uniform Rule 14 (b) (1) of the Rules of the Justices, New York County, Supreme Court, Civil Branch. Despite the apparent violation, and in the absence of substantial prejudice to defendants, who have submitted replies, the court shall waive compliance with this rule in this instance. The parties are advised they should not repeat this error on future submissions.

Next, the Schwitzer Defendants object to the redactions on plaintiff's submissions. The court acknowledges that plaintiff failed to comply with two court rules that would justify the redactions. The affidavits redact information beyond that permitted under Uniform Rules for Trial Courts (22 NYCRR) § 202.5 (e) (1), which allows a party to omit or redact confidential personal information, such as taxpayer identification or social security numbers, dates of birth, a minor's full name, and financial account information. Further redactions may require a motion to file under seal pursuant to Uniform Rules for Trial Courts ([22 NYCRR) § 216.1 (a),[5] which was not done; nor has plaintiff sought to present unredacted versions for an in camera inspection. However, the

[4] Plaintiff's memoranda in opposition to the motions of the Garcia Defendants and the Individual Defendants stand at 54 pages and 51 pages, respectively.

[5] Moreover, consent to change attorney forms constitute public court records because they are filed with the clerk (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.1 [b]; CPLR 321 [b] [1]).

contents contained in these affidavits and other redacted submissions are concrete, factual allegations akin to that which would be typically submitted in opposition on a motion to dismiss.[6] Indeed, defendants are not suggesting that the affiants are not real people with real cases. While the Court finds that it could consider the allegations and the content of the affidavits and supplemental submissions themselves, irrespective of the omission of particular identifying information, as shown below, such consideration (or lack thereof) of the supplemental submissions does not affect the outcome of this decision.

A. First Cause of Action for Tortious Interference with Contract

The first cause of action alleges that defendants induced plaintiff's clients to breach their retainers without justification (NYSCEF Doc No. 2, ¶¶ 47-49). Defendants argue that plaintiff failed to adequately plead the claim because it has not alleged that defendants' conduct amounted to a crime or independent tort. Additionally, the complaint lacks factual allegations identifying specific client names, dates and times describing when the tortious acts occurred or the specific actors involved, as required under CPLR 3013 and 3016. Plaintiff predicates the tortious inference claim upon alleged violations of Judiciary Law §§ 479 and 482, which prohibit an attorney or its agent or employee from directly or indirectly soliciting or procuring business.

To plead a cause of action for tortious interference with contract, there must be a valid contract, the defendant's knowledge of that contract, the intentional and improper procurement of a breach, and damages (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). The "interference must be intentional, not merely negligent or incidental to some other, lawful, purpose" (*Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 281 [1978]). Additionally,

[6] Such redactions may affect the admissibility of such evidence upon a motion for summary judgment. However, it is expected that, in any event, prior to such motion, the parties would have exchanged the redacted information during the discovery process.

the defendant's actions must be the "but for" cause of the breach (*see Meer Enters., LLC v Kocak*, 173 AD3d 629, 631 [1st Dept 2019] [internal quotation marks and citation omitted]).

As is relevant here, a client may discharge his or her attorney at any time, with or without cause (*see Demov, Morris, Levin & Shein v Glantz*, 53 NY2d 553, 556 [1981]). As such, a client's retainer agreement with an attorney constitutes a contract that is terminable at-will (*see Lowenbraun v Garvey*, 60 AD3d 916, 917 [2d Dept 2009]; *Koeppel v Schroder*, 122 AD2d 780, 782 [2d Dept 1986]). Agreements that are terminable at-will "are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts" (*American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 417 [1st Dept 1998]). Furthermore, "[a] competitor who lawfully induces termination of a contract terminable at will commits no ethical violation and does not produce a result contrary to the expectations of the parties" (*Koeppel*, 122 AD2d at 782).

Nevertheless, a cause of action for tortious interference with a terminable at-will contract may be sustained where the defendant's conduct constitutes a crime or an independent tort (*see Steinberg v Schnapp*, 73 AD3d 171, 176 [1st Dept 2010]). Significantly, there must be "probative evidence of malice, or the use of wrongful means by the defendants" (*Thur v IPCO Corp.*, 173 AD2d 344, 345 [1st Dept 1991], *lv dismissed* 78 NY2d 1007 [1991]). Wrongful means for purposes of the claim refers to "fraudulent representations, or threats or ... [a] violation of a duty of fidelity owed to the plaintiff by the defendant by reason of a relation of confidence existing between them" (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 194 [1980] [internal citations omitted]). "[P]hysical violence, fraud or misrepresentation, civil suits and criminal prosecutions and some degrees of economic pressure" also constitute wrongful means whereas persuasion alone does not (*id.* at 191).

"[A] law firm may prevail on a claim that a third party induced a client to cancel a retainer agreement upon a demonstration that the inducement was wrongfully effected" (*Dilimetin & Dilimetin v Stein*, 297 AD2d 601, 602 [1st Dept 2002]). While purportedly defamatory statements, without more, cannot sustain a claim for tortious interference (*see M.J. & K. Co. v Matthew Bender & Co.*, 220 AD2d 488, 490 [2d Dept 1995]), the complaint asserts that the Schwitzer Defendants and the Individual Defendants employed more than just mere persuasion or encouragement to induce plaintiff's clients to change counsel.

Judiciary Law § 479 reads as follows:

> "It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainers or agreements."

Judiciary Law § 482 states:

> "It shall be unlawful for an attorney to employ any person for the purpose of soliciting or aiding, assisting or abetting in the solicitation of legal business or the procurement through solicitation either directly or indirectly of a retainer, written or oral, or of any agreement authorizing the attorney to perform or render legal services."

A violation of Judiciary Law § 479 or Judiciary Law § 482 is an unclassified misdemeanor (*see Matter of Meyerson*, 46 AD3d 141, 142 [1st Dept 2007]; *Matter of Rosenblatt*, 26 AD3d 49, 50 [2d Dept 2006]). Here, the submissions suggest that the Schwitzer Defendants improperly used case runners to solicit plaintiff's clients by offering them cash, transportation and loan forgiveness to induce plaintiff's clients to change firms. Such actions are "not favorably regarded" (*Matter of Kressner*, 108 AD2d 334, 335 [1st Dept 1985], *lv denied* 65 NY2d 608 [1985], *lv denied, appeal dismissed* 65 NY2d 999 [1985]). Although Pena and Gomez deny any association with the

Schwitzer Firm (NYSCEF Doc No. 62 at 28 and 30), Hernandez's affidavit indicates otherwise. It is also unclear, at this juncture, how or why Pena was included in Hernandez's meeting with Semel-Weinstein and Merlino.

As to the Garcia Defendants, the allegations implicating them in the scheme are made solely upon information and belief. Allegations made "[upon] information and belief ... are to be considered true for the purposes of a motion to dismiss pursuant to CPLR 3211 (a) (7)" (*Roldan v Allstate Ins. Co.*, 149 AD2d 20, 40 [2d Dept 1989]). Furthermore, there has been no discovery regarding the three clients who changed counsel to the Garcia Firm and the client who changed counsel to the Schwitzer Firm, or the connection, if any, between defendants.

Additionally, while defendants complain that other factors may have incited plaintiff's former clients to act, the complaint alleges that the defendants' conduct caused these clients to terminate their retainers and caused plaintiff to sustain damages, which is sufficient to satisfy the "but for" element of a tortious interference claim. The statement from the Schwitzer Firm's former employee, to the extent it is considered, indicates that at least one client changed counsel because he received a cash payment. Thus, those branches of the motions seeking to dismiss the first cause of action are denied.

B. Second Cause of Action for a Violation of Judiciary Law § 487

The second cause of action is grounded upon an alleged violation of Judiciary Law § 487. Defendants argue the claim must fail because it was not pled with the requisite particularity describing defendants' intentional deceit or egregious conduct. Plaintiff posits that its submissions establish a pattern of wrongdoing and deceit.

Judiciary Law § 487 provides, in part, that an attorney who is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party ...

forfeits to the party injured treble damages, to be recovered in a civil action." The statute focuses on the intent to deceive (*see Amalfitano v Rosenberg*, 12 NY3d 8, 14 [2009]). Thus, a plaintiff must plead the attorney's intentional deceit damages caused by the deceit (*see Doscher v Mannatt, Phelps & Phillips, LLP*, 148 AD3d 523, 524 [1st Dept 2017]). The alleged deceit must be directed at the court or must occur during a pending judicial proceeding (*see Costalas v Amalfitano*, 305 AD2d 202, 204 [1st Dept 2003]). It must be shown that the alleged deceit "reaches the level of egregious conduct or a chronic and extreme pattern of behavior" (*Savitt v Greenberg Traurig, LLP*, 126 AD3d 506, 507 [1st Dept 2015] [internal quotation marks and citation omitted]; *but see Dupree v Voorhees*, 102 AD3d 912, 913 [2d Dept 2013]). The allegations must be pled with particularity (*see Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 [1st Dept 2015], *lv denied* 28 NY3d 903 [2016]).

As an initial matter, the statute does not apply to non-attorneys, such as the Individual Defendants (*see Neroni v Follender*, 137 AD3d 1336, 1338 [3d Dept 2016], *appeal dismissed* 27 NY3d 1147 [2016], *rearg denied* 28 NY3d 1024 [2016]). Accordingly, the second cause of action is dismissed against them.

As to the remaining defendants, the second cause of action is also dismissed. Relief under the statute is available only to a plaintiff who was a party in a pending judicial proceeding (*see Costalas*, 305 AD2d at 204). While the statute does not limit recovery only to the offending attorney's client (*see Fields v Turner*, 1 Misc 2d 679, 680-681 [Sup Ct, NY County 1955]), "[t]he 'party' referred to is clearly a party to an action pending in a court in reference to which the deceit is practiced, and not a person outside, not connected with the same at the time or with the court" (*Gelmin v Quicke*, 224 AD2d 481, 483 [2d Dept 1996], quoting *Looff v Lawton*, 97 NY 478, 482 [1884]). Plaintiff was not a party to any pending, underlying judicial proceeding.

Plaintiff's reliance on the client affidavits, if considered, is misplaced. Essential to a claim under Judiciary Law § 487 is harm to the plaintiff caused by the purportedly deceitful acts (*see Doscher*, 148 AD3d at 524). Each affiant chose to remain a client of plaintiff. The facts in *Fields* (1 Misc 2d 679) are also dissimilar. In *Fields*, an attorney, who represented the plaintiff's wife, made several representations to the court in order to procure an arrest warrant for the plaintiff (*id.* at 680), whereas here, the purportedly false statements by the Schwitzer Defendants and the Garcia Defendants were not made to the court while they were representing a party in a pending judicial proceeding.

C. Third Cause of Action and the Counterclaim for Defamation

1. Plaintiff's Third Cause of Action

The complaint alleges that defendants verbally denigrated plaintiff by calling it a "thief" or "the biggest thief," equating plaintiff to "doctors that kill you," and telling plaintiff's clients that plaintiff is ill-equipped or incompetent to handle their claims and will steal their money (NYSCEF Doc No. 22, ¶ 35). Defendants contend that the third cause of action should be dismissed because (1) plaintiff failed to plead defamation with particularity and (2) the words constitute non-actionable opinion or hyperbole. Plaintiff asserts it has pled a defamation per se claim based on an agency theory of liability. Specifically, Pena's statement that plaintiff had "robbed" her son of "millions" implicates grand larceny in the first degree, a class B felony involving property that exceeds $1 million in value (*see* Penal Law § 155.42). The Schwitzer Defendants and the Garcia Defendants, in reply, argue that they did not utter any of the statements at issue and that at least one statement purporting to claim that plaintiff "was not doing a good job" is time-barred, having been published in 2016 (NYSCEF Doc No. 70, ¶ 6). They further contend that plaintiff has not, and cannot, show that it has been damaged by the publication of these statements because none of

the clients who heard them terminated their retainers. Additionally, neither Pena nor Gomez were employed or associated with the Schwitzer Defendants, as evidenced in their affidavits submitted with the Schwitzer Defendants' answer (NYSCEF Doc No. 62 at 28 and 30).

Defamation is the "[m]aking [of] a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace" (*Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]). To prevail on a cause of action for defamation, a plaintiff must show: "(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm" (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). On a motion to dismiss a defamation claim, the court must determine "whether the contested statements are reasonably susceptible of a defamatory connotation" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [internal quotation marks and citation omitted]), by construing the words "in the context of the entire statement or publication as a whole, tested against the understanding of the average reader" (*Aronson v Wiersma*, 65 NY2d 592, 594 [1985]). If the challenged words, taken in their "ordinary meaning and in context," are reasonably susceptible of a defamatory connotation, then the motion to dismiss must be denied (*Davis*, 24 NY3d at 272).

A cause of action for defamation must plead the "particular words complained of" (CPLR 3016 [a]), including "who said them and who heard them, when the speaker said them, and where the words were spoken" (*Glazier v Harris*, 99 AD3d 403, 404 [1st Dept 2012] [internal quotation marks and citation omitted]). A complaint that does not comport with these requirements must be dismissed (*see Vertical Sys. Analysis, Inc. v Balzano*, 171 AD3d 621, 622 [1st Dept 2019]). Here, the complaint fails to set forth the specific dates and times the allegedly defamatory words were spoken (*see Offor v Mercy Med. Ctr.*, 171 AD3d 502, 503 [1st Dept 2019]). Even if the court were to consider the affidavits, they fail to cure this pleading deficiency as to the date and time each

statement was made. One client was approached "a couple of months ago" (NYSCEF Doc No. 65, ¶ 5), and another was approached "sometime this month" (NYSCEF Doc No. 79, ¶ 5). Two clients discussed having been approached during therapy "the week of October 22, 2018" (NYSCEF Doc No. 75, ¶ 5; NYSCEF Doc No. 77, ¶ 5). Additionally, the affidavits contain only paraphrased versions of the statements (*see Mañas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008]). Furthermore, defamation is subject to a one-year statute of limitations (*see* CPLR 215 [3]). The conversation with Diamond took place on December 1, 2016, more than one year before plaintiff initiated this action (NYSCEF Doc No. 70, ¶¶ 3-5).

Hernandez's affidavit, though, does set forth the exact time, date, and manner and the specific words that form the basis of the claim. He avers that at their first meeting on October 22, 2018, Pena "described Ginarte as 'scammers,' as 'robbers' who are 'just here to screw people, not help people,' and to 'steal money'" (NYSCEF Doc No. 72, ¶ 10). During a telephone conversation with Hernandez that same date, Pena called plaintiff "the biggest thief" and said that "you don't know how many millions [the defendants] are giving [the clients], and [Ginarte] is keeping that money … all Hispanic people's money" (NYSCEF Doc No. 60, plaintiff's memorandum of law at 37-38). It is alleged that Pena also stated, "The lawyer is like a doctor. [t]here are doctors that cure you, and there are doctors that kill you … [t]here are good attorneys … and then there are [the] lawyers that robbed my son" (*id.* at 38). The above-referenced statements appear within the transcript as follows:

> "Look, we took a young guy who was Ecuadorian, 2 years with Ginarte, because Ginarte is *the biggest thief.* Since he was already there – he had a lawsuit, one of them checked the computer for a lawyer that I took them to, that my daughter took them to. And, when he went, he did not get a lawsuit, what he got was compensation. And, that is why I am telling you, because, listen up, we always want to call, because you were leaving.
>
> …

> Look. Yes. My son fell down 2 sto ... From, a 4th floor in construction, and the lawyers said they had work now. That is a lawsuit to start from between $15 and $20,000 – $20 million. And, what did they give my son? Well, he says that lawyer is a super thief, those lawyers. They have [sic] him $1,300,000 pesos. And, as Hispanics, as they say – what they say there is that, I want to work with you. That they fill up our envelopes and also that is already a lot of money, because in our country, it is a lot.
>
> ...
>
> Nevertheless, they tell you: 'See what their strategy is like?' They say that to you. They say: 'Look at everything there is, they have it.' Which means something like: 'This is all there is, that is all there – if we go to court, you could lose it.' And they make you think: 'You, sign.'
>
> ...
>
> For $1 million, let's assume, $300, $1,400,000 or $2 million. But, *you do not know how many millions they are giving* signing for them.
>
> ...
>
> *And they are keeping that money*. That is what – they give you a – they explain all this to you, when you go. Do you understand me?
>
> ...
>
> Now, they are saying that lawyers are not – that *the lawyer is like a doctor. There are doctors that cure you, and doctors that kill you.*
>
> ...
>
> And so, the same thing goes for a lawyer. A lawyer – *there are good lawyers, there are lawyers that are – they robbed my son.* He fell 4 stories, they were going to grab – and so, that is why he did not die. My son should have gotten – start the lawsuit with that, it was between, between $20 and $25 million, $15 to start. What they gave him was not money, because they are keeping *all Hispanic people's money*"[7]

(NYSCEF Doc No. 72 at 8-9 [Hernandez aff, exhibit 1 at 1-2]) (emphasis added).

Contrary to defendants' assertions, the statement that plaintiff "robbed" Pena's son does not constitute nonactionable opinion or rhetorical hyperbole. The falsity of a published statement

[7] Although Hernandez and Pena conversed in Spanish, plaintiff has furnished the court with a certified English-language translation of the audio recordings.

is key to a defamation claim because only a statement that purports to convey facts about the plaintiff are actionable (*see Gross v New York Times Co.*, 82 NY2d 146, 153 [1993]). Therefore, "[o]pinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 380 [1977], *rearg denied*, 42 NY2d 1015 [1977], *cert denied*, 434 US 969 [1977]). A statement of "pure opinion," which is supported by the facts upon which the statement is based, is protected, "no matter how vituperative or unreasonable it may be" (*Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]). Similarly, "rhetorical hyperbole, vigorous epithets, and lusty and imaginative expression ... imprecise language and [an] unusual setting ... [which] signal [to] the reasonable observer that no actual facts were being conveyed about an individual" are not actionable (*Immuno AG v Moor-Jankowski*, 77 NY2d 235, 244 [1991], *cert denied* 500 US 954 [1991]). But, where a statement "implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is 'mixed opinion' and is actionable" (*Steinhilber,* 68 NY2d at 289). Factors to consider in determining whether a statement constitutes fact or opinion are:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to 'signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact'"

(*Brian v Richardson*, 87 NY2d 46, 51 [1995], quoting *Gross*, 82 NY2d at 153, quoting *Steinhilber*, at 292 [internal quotation marks omitted]). The context of the communication, including "the immediate context in which the disputed words appear ... [and] the larger context in which the

statements were published," may be the most significant factor (*Brian*, 87 NY2d at 51). "Whether a particular statement constitutes fact or opinion is a question of law" (*Rinaldi*, 42 NY2d at 381).

"Accusations of criminal or illegal activity, even in the form of an opinion, are not constitutionally protected" (*Angel v Levittown Union Free Sch. Dist. No. 5,* 171 AD2d 770, 772 [2d Dept 1991]). The statements at issue here claim that plaintiff "robbed" Pena's son. The court also finds that the words constitute an actionable statement of mixed opinion because they are predicated upon facts not disclosed to the listener (*see Davis*, 24 NY3d at 272 *Glazier*, 99 AD3d at 404). For instance, Pena implied that her son should have received between $20 to $25 million but plaintiff was "keeping all Hispanic people's money." When read in context, the average person could interpret the statement to implicate a fact known only to her.

In addition, after affording plaintiff the benefit of every possible favorable inference, as the court must (*see Leon*, 84 NY2d at 87), plaintiff has adequately pleaded a claim for defamation per se. Ordinarily, a plaintiff asserting a defamation claim must plead special damages unless the plaintiff meets one of four recognized exceptions (*see Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992]), two of which are relevant to this action. Statements that charge the plaintiff with a serious crime or statements that tend to injure or disparage the plaintiff in his or her trade, business or profession constitute slander per se (*id.* at 435). As to the first exception, the defamatory words must "impute the commission of an indictable offense upon conviction of which punishment may be inflicted" (*Privitera v Town of Phelps*, 79 AD2d 1, 3 [4th Dept 1981], *appeal dismissed* 53 NY2d 796 [1981]). Indeed, words "are not slanderous per se unless they specify a crime or a crime is readily apparent from properly pleaded innuendo" (*id.* at 5). As to the second exception, statements which "cause apprehension about a person's ability to conduct business" are actionable (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 1076 [1997]). Expressing "mere dissatisfaction"

with one's work performance is not defamatory per se (*see Angel,* 171 AD2d at 772); *Frechtman v Gutterman*, 115 AD3d 102, 106 [1st Dept 2014] [dismissing a defamation claim because the words "misconduct" and "malpractice" amounted to "opinions and beliefs of dissatisfied clients about their attorneys' work"]). A plaintiff alleging defamation per se is under no obligation to offer evidentiary facts establishing malice to defeat a motion to dismiss (*see Arts4All, Ltd. v Hancock*, 5 AD3d 106, 109 [1st Dept 2004]). Whether a statement is "defamatory per se is a question of law" (*Geraci v Probst*, 15 NY3d 336, 344 [2010]).

It is not "slander per se to charge that one is a 'bad man,' a 'criminal, or a 'crook' ... [as] [s]uch words are too general" (*Privitera*, 79 AD2d at 4 [internal quotation marks and citations omitted]). Similarly, the phrase "doctors that kill you" lacks a precise meaning (*see Cardali v Slater*, 167 AD3d 476, 477 [1st Dept 2018], *lv denied* 33 NY3d 901[2019] [concluding that the phrase "really nothing more than a common criminal" has an "imprecise meaning that is not capable of being proving true or false"]). But, "[i]t is slanderous *per se* to call another a thief" (*Weinger v Vogel*, 18 AD2d 748, 749 [3d Dept 1962] [internal quotation marks and citation omitted]; *Dallin v Mayer*, 122 AD 676, 676 [1st Dept 1907]; *Woods v Gleason*, 18 App Div 401 [2d Dept 1897] ["Charging a person with being a thief and robber is slanderous, as it imputes larceny"]). When read in the context in which they were spoken and after accounting for their tone and purpose, the allegedly defamatory words accuse plaintiff of theft in that plaintiff was a "thief" and that it had "robbed" Pena's son by keeping his money (*see Angel*, 171 AD2d at 772). Needless to say, robbing a client of settlement money, as Pena suggests, "can be readily interpreted as imparting to plaintiff 'fraud, dishonesty, misconduct or unfitness in ... business'" (*Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 261 [1st Dept 1995] [internal citation omitted]). Furthermore, the statements tend to disparage plaintiff because they were spoken in connection

with its legal work (*see Glazier*, 99 AD3d at 404; *Grinaldo v Meusburger*, 34 AD2d 586, 587 [3d Dept 1970], *appeal dismissed* 27 NY2d 598 [1970]).

Counter to defendants' positions, the allegation that the Individual Defendants were employed by or associated with them sufficiently apprises them of plaintiff's intent to rely on an agency theory (NYSCEF Doc No. 22, ¶¶ 29-30). "The doctrine of vicarious liability ... imputes liability to a defendant for another person's fault" (*Feliberty v Damon*, 72 NY2d 112, 117-118 [1988]). Control over the alleged wrongdoer is a key element (*id.* at 118). Although defendants argue that the complaint fails to plead the requisite control element, the transcript of Pena's telephone conversation with Hernandez reveals that Gomez "works with them" (NYSCEF Doc No. 72 [Hernandez aff, exhibit 1 at 5] at 12). Thus, the motions insofar as they seek dismissal of the third cause of action are denied.

2. The Schwitzer Defendants' Counterclaim

The Schwitzer Defendants assert a counterclaim for defamation based on plaintiff's allegations that they had engaged in dishonest and unethical behavior (NYSCEF Doc No. 62, counterclaim ¶ 14). The allegedly defamatory words at issue are "high-pressure sales tactics and persuasion," "briefcase full of cash," and "coordinated scheme involving classic ambulance-chasing tactics" (*id.*). The Schwitzer Defendants also attach the full text of the New York Post and New York Law Journal articles to their answer, but the counterclaim does not identify the offensive words at issue in those articles.

Plaintiff posits that the statements in its complaint are absolutely privileged because they were made during the course of a judicial proceeding. As an alternative, the counterclaim is barred by Civil Rights Law § 74. The Schwitzer Defendants, in opposition, contend that they have pled a claim for defamation per se because the "'sham action' [was] brought solely for the malicious

purpose of denigrating and embarrassing the Schwitzer Defendants" (NYSCEF Doc No. 135, the Schwitzer Defendants' reply memorandum of law at 28).

Not all statements are defamatory because certain communications, which are subject to an absolute or qualified privilege, are immune from suit (*see Toker v Pollak*, 44 NY2d 211, 218-219 [1978]). Statements made in a judicial or quasi-judicial proceeding are subject to an absolute privilege "irrespective of an attorney's motive for making them" (*Front, Inc. v Khalil*, 24 NY3d 713, 718 [2015], *rearg denied* 25 NY3d 1036 [2015]), provided that the statements are "pertinent to the subject matter of the lawsuit ... [and] are made in good faith and without malice" (*see Lacher v Engel*, 33 AD3d 10, 13 [1st Dept 2006] [internal quotation marks and citations omitted]). However, this "privilege is capable of abuse and will not be conferred where the underlying lawsuit was a sham action brought solely to defame" (*Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015]). The court finds that the statements in the complaint in this action are subject to an absolute privilege (*see Manhattan Sports Rests. of Am., LLC v Lieu*, 146 AD3d 727, 727 [1st Dept 2017]). Plaintiff's substantial opposition to the motions, in which it expanded on its allegations, undermines the argument that the ligation is a "sham" (*id.*).

The statements are also protected under the fair reporting privilege found in Civil Rights Law § 74, which provides an absolute privilege for a fair and true report of a judicial proceeding and legal pleadings (*see Martin v Daily News L.P.*, 121 AD3d 90, 100 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014]). "Comments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that fall within section 74's privilege" (*Lacher*, 33 AD3d at 17; *accord Crucey v Jackall*, 275 AD2d 258, 262 [1st Dept 2000] [Saxe, J, concurring]), provided that the report is fair and true. It is also settled that "newspaper accounts of ... official proceedings must be accorded some degree of liberality" (*Holy Spirit Assn. for*

Unification of World Christianity v New York Times Co., 49 NY2d 63, 68 [1979]). Therefore, a report is fair and true where the report's substance is substantially accurate (*id.* at 67). A close reading of the two articles at issue reveals that both summarize the complaint's allegations. Accordingly, plaintiff's motion to dismiss the Schwitzer Defendants' counterclaim is granted, and the Schwitzer Defendants' counterclaim is dismissed.

D. Fourth Cause of Action for Unfair Competition

The fourth cause of action seeks damages of at least $10 million for defendants' improper solicitation of plaintiff's clients "via a coordinately scheme to use classic ambulance-chasing tactics" (NYSCEF Doc No. 22, ¶ 65). Defendants urge the court to dismiss this cause of action because the complaint does not include an allegation that they misappropriated a commercial advantage belonging exclusively to plaintiff or misappropriated plaintiff's goodwill. In addition, plaintiff's clients are not property over which an unfair competition claim may be maintained. Plaintiff responds that the claim is predicated upon its "substantial investment in the pursuit of those clients' legal claims" (NYSCEF Doc No. 60, plaintiff's memorandum of law at 44) (emphasis removed).

New York recognizes palming off and misappropriation as proper bases for common-law unfair competition (*see ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 476 [2007]). The allegations herein sound in misappropriation, which "'concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property'" (*id.* at 478, quoting *Roy Export Co. v Columbia Broadcasting Sys.*, 672 F2d 1095, 1105 [2d Cir 1982], *cert denied* 459 US 826 [1982]). Unfair competition is primarily concerned with "'protection of a business from another's misappropriation of the business' organization [or its] expenditure of labor, skill, and money'" (*Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56 [1st Dept 2015], quoting

Ruder & Finn Inc. v Seaboard Sur. Co., 52 NY2d 663, 671 [1981], *rearg denied* 54 NY2d 753 [1981]). The claim requires more than just commercial unfairness (*Ruder*, 52 NY2d at 671]). Therefore, to successfully plead an unfair competition claim based on misappropriation, the "plaintiff must allege that a defendant misappropriated plaintiff's labor, skills, expenditures or good will, and displayed some element of bad faith in doing so" (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 30 [1st Dept 2015]). Stated another way, the defendant must have acted in an "unethical way and thereby unfairly neutralized a commercial advantage" belonging to the plaintiff (*E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 449 [2018]). The plaintiff, however, need not plead that the defendant was an actual competitor (*see REDF-Organic Recovery, LLC v Rainbow Disposal Co., Inc.*, 116 AD3d 621, 622 [1st Dept 2014]).

Here, the complaint fails to plead a cause of action for common-law unfair competition. The crux of the claim is the alleged poaching of plaintiff's clients, but, as discussed earlier, a client may choose to discharge his or her attorney at any time with or without cause (*see Demov, Morris, Levin & Shein*, 53 NY2d at 556). Thus, the exclusive advantage element is lacking. Plaintiff's contention that defendants misappropriated its marketing and investigation efforts is unpersuasive as it has not been alleged that they used plaintiff's work product against it for their own gain (*see Miller v Walters*, 46 Misc 3d 417, 427 [Sup Ct, NY County 2014] [dismissing the unfair competition claim where the plaintiffs asserted that a rival sports management firm stole their client because the client's sports achievements cannot form the basis for a claim]; *NYC Mgt. Group Inc. v Brown-Miller*, 2004 WL 1087784, * 9, 2004 US Dist LEXIS 8652, *30 [SD NY, May 14, 2004, No. 03-Civ-2617 (RJH)] [dismissing an unfair competition claim where the plaintiff had alleged that the defendants, a rival modeling agency and its agents, caused one of its clients to sever their relationship because the property at stake consisted of intangible property, such as the

client's "future performances as a model, or the investments that plaintiffs made in increasing her appeal and marketability"]). Rather, it is claimed that defendants maligned plaintiff's work when targeting prospective clients. Consequently, the motions seeking to dismiss the fourth cause of action are granted, and the fourth cause of action is dismissed.

E. Fifth Cause of Action for Unjust Enrichment

The fifth cause of action alleges that defendants have been unjustly enriched by plaintiff's "extraordinary marketing efforts," client intake and investigation, and legal research (NYSCEF Doc No. 22, ¶¶ 69 and 72). Defendants argue that the fifth cause of action fails because plaintiff did not plead the existence of a relationship between them. Plaintiff claims there is a connection between the parties that could have caused reliance.

Unjust enrichment is "the receipt by one party of money or a benefit to which it is not entitled, at the expense of another" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]). While a plaintiff need not be in privity with the defendant to recover, "a claim will not be supported if the connection between the parties is too attenuated" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). The relationship between the parties must be such that it "could have caused reliance or inducement" (*id.* at 183). Therefore, the "plaintiff must show that (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Kramer v Greene*, 142 AD3d 438, 442 [1st Dept 2016] [internal quotation marks and citations omitted]).

Applying these precepts to the present claim, the court finds that the complaint fails to state a cause of action for unjust enrichment. Plaintiff pleads that it would be inequitable to permit defendants to benefit from their work product, but absent from the complaint is an allegation of a prior relationship between them that could have caused inducement or reliance on plaintiff's part

(*see Mandarin Trading Ltd.*, 16 NY3d at 182; *Joseph P. Carroll Ltd. v Ping-Shen*, 140 AD3d 544, 544 [1st Dept 2016], *lv denied* 28 NY3d 914 [2017] [dismissing an unjust enrichment claim where the plaintiffs failed to plead the existence of a prior relationship]). Plaintiff's contention that a close relationship exists is unconvincing. Nothing in its submissions illustrates any direct dealings between the parties before plaintiff's receipt of the substitution letters (*see Schroeder*, 133 AD3d at 27 [dismissing an unjust enrichment claim where the plaintiffs had no contact with the defendants]). As law firms operating within in the same personal injury market, the parties were certainly aware of the other law firms' existences, but "mere awareness," standing alone, cannot support a cause of action for unjust enrichment (*see Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 409 [1st Dept 2011], *affd* 19 NY3d 511 [2012]). Furthermore, "[i]t is not enough that the defendant received a benefit from the activities of the plaintiff" (*Kagan v K-Tel Entertainment*, 172 AD2d 375, 376 [1st Dept 1991]). The plaintiff must plead that it performed at the defendant's behest (*see AJ Contr. Co., Inc. v Farmore Realty Inc.*, 47 AD3d 501, 501 [1st Dept 2008], *lv denied* 10 NY3d 715 [2008]; *Eastern Consolidated. Props. v Chemical Bank*, 269 AD2d 261, 261 [1st Dept 2000] [stating that if the plaintiff performed at the behest of another, the plaintiff must look to that person for recovery]). The complaint does not allege that plaintiff completed any marketing and investigative work at defendants' behest. Accordingly, the motions insofar as they seek dismissal of the fifth cause of action are granted, and the fifth cause of action is dismissed.

F. Sixth Cause of Action for a RICO Violation

The sixth cause of action alleges a RICO violation based upon defendants' use of the telephone, internet, facsimile machines and the United States mail system to commit a fraud on plaintiff (NYSCEF Doc No. 22, ¶¶ 77-80).

At issue is 18 USC § 1962, titled "Prohibited activities," which reads, in relevant part:

> "(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt."

RICO targets racketeering activity, which "encompass[es] dozens of state and federal offenses, known in RICO parlance as predicates" (*RJR Nabisco, Inc. v European Community*, 136 S Ct 2090, 2096 [2016]). The predicate offenses must form a "'pattern of racketeering activity' – a series of related predicates that together demonstrate the existence or threat of continued criminal activity" (*id.* at 2096-2097 [internal quotation marks and citation omitted]).

To constitute a pattern of racketeering activity, at least two acts of racketeering activity must take place within a 10-year period (*see Simpson Elec. Corp. v Leucadia, Inc.*, 72 NY2d 450, 461 [1988]). Although the act does not impose a specific temporal requirement concerning the proximity of each offense, there must be a relationship between the acts such that "'they bear to each other or to some external organizing principle'" (*East 32nd St. Assoc. v Jones Lang Wootton USA*, 191 AD2d 68, 73 [1st Dept 1993], quoting *H.J. Inc. v Northwestern Bell Tel. Co.*, 492 US 229, 238 [1989]). The relationship cannot be predicated solely on isolated events (*East 32nd St. Assoc.*, 191 AD2d at 73).

A RICO violation also contains a continuity component consisting of either a closed-ended period of past racketeering activity or an open-ended threat of continued racketeering activity (*H.J. Inc.*, 492 US at 241). Isolated or sporadic acts (*id.* at 251 [Scalia, J., concurring]) or acts that occur over a few weeks or months (*see Freeburg v Trans World Metals*, 160 AD2d 624, 624 [1st Dept

1990]), do not satisfy the continuity element (*see Fekety v Gruntal & Co.*, 191 AD2d 370, 371 [1st Dept 1993]). There must be a threat of ongoing activity (*see Simpson*, 72 NY2d at 463).

The existence of an enterprise is a separate RICO element (*see First Capital Asset Mgt. v Satinwood, Inc.*, 385 F3d 159, 173 [2d Cir 2004]). An enterprise for RICO purposes is "'a group of persons associated together for a common purpose of engaging in a course of conduct'" (*id.*, quoting *United States v Turkette*, 452 US 576, 583 [1981]). Further, an enterprise is established where its participants agree to form a RICO enterprise and commit two predicate acts (*Cofacredit, S.A. v Windsor Plumbing Supply Co., Inc.*, 187 F3d 229, 244 [2d Cir 1999]).

RICO affords a private cause of action for those injured by racketeering activity, including the recovery of attorney's fees and treble damages (*see* 18 USC § 1964 [c]). Thus, a civil RICO plaintiff bears two burdens on pleading. First, the plaintiff must allege "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce" (*Moss v Morgan Stanley Inc.*, 719 F2d 5, 17 [2d Cir 1983], *cert denied sub nom. Moss v Newman*, 465 US 1025 [1984], quoting 18 USC § 1962 [a] to [c]). The predicate acts underlying a RICO claim must be pled with particularity (*see Pludeman v Northern Leasing Sys., Inc.*, 40 AD3d 366, 368 [1st Dept 2007], *affd* 10 NY3d 486 [2008]). Allegations that are "largely generalized" as to all defendants are insufficient (*Dennis v JPMorgan Chase & Co.*, 345 F Supp 3d 122, 186 [SD NY 2018]). As such, the complaint must set forth the precise statement or omission made, the time and place of each statement, the identity of each person who made the statement or omission, the content and manner in which the statement misled the plaintiff, and the benefit the defendant received as a result (*see Ritchie v Carvel Corp.*, 180 AD2d 786, 787 [2d Dept 1992]). Second, the plaintiff must

allege an injury suffered "'*by reason of* a violation of section 1962" (*Moss*, 719 F2d at 17, quoting 18 USC § 1964 [c]). The plaintiff must also plead an "'*actual*, quantifiable injury'" (*Kerik v Tacopina*, 64 F Supp 3d 542, 560 [SD NY 2014] [internal quotation marks and citations omitted]).

Mail fraud and wire fraud qualify as racketeering activities (*see* 18 USC § 1961 [1] [B]). Mail fraud requires the placement in "any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service" an article in furtherance of a fraudulent scheme (18 USC § 1341). Wire fraud requires the transmission "by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing" a fraudulent scheme (18 USC § 1343). The analysis of mail fraud and wire fraud claims are the same (*see United States v Weaver*, 860 F3d 90, 94 [2d Cir 2017]). The elements of a mail fraud or wire fraud claim are "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the mails or wires to further the scheme" (*id.* [internal quotation marks and citation omitted]).

Here, the complaint fails to meet the heightened pleading requirements necessary to sustain a RICO claim (*see Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 685-686 [2d Dept 2016]). First, the complaint does not adequately describe the commission of a predicate act by each defendant (*see Ritchie*, 180 AD2d at 787 [determining that the plaintiff failed to connect each defendant to a particular misrepresentation]; *DC Med. Capital, LLC v Sivan*, 2009 NY Slip Op 30650[U], *17 [Sup Ct, NY County 2009] [concluding that the complaint must "specify the individual misconduct attributable to each defendant"]). Likewise, the complaint does not allege that each defendant "personally ... aided and abetted the commission of two predicate acts" (*McLaughlin v Anderson*, 962 F2d 187, 192 [2d Cir 1992]), or that "each defendant *personally* agreed to commit two or more of the predicate acts" (*Friedman v Arizona*

World Nurseries Ltd. Partnership, 730 F Supp 521, 549 [SD NY 1990], *affd* 927 F2d 594 [2d Cir 1991]). The majority of the allegations describe the actions of Pena and Gomez, not the Schwitzer Defendants or the Garcia Defendants. Moreover, the allegations largely pertain to defendants, collectively, as group, which is insufficient (*see United States v Persico*, 832 F2d 705, 714 [2d Cir 1987], *cert denied* 486 US 1022 [1988] [stating that 18 USC § 1962 (c) focuses on "individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise"]). Plaintiff's attempt to establish a pattern of racketeering activity by linking the prior professional misconduct by Hamel and Garcia to defendants alleged conduct also fails in the absence of specific allegations that Hamel and defendants agreed to participate in a racketeering enterprise and that Hamel and each defendant acted in furtherance of that enterprise.

As against the Schwitzer Defendants, plaintiff identifies only a single instance of mail fraud (NYSCEF Doc No. 63, affirmation of plaintiff's counsel, exhibit 2 at 10-12) and a single instance of wire fraud, namely the use of an Uber vehicle to transport Hernandez to the Schwitzer Firm's office (NYSCEF Doc No. 72, ¶ 20). This is inadequate to plead a pattern of racketeering activity (*see Thypin Steel Co. v Certain Bills of Lading*, 1198 WL 912100, *6, 1998 US Dist LEXIS 20212, *22 [SD NY, Dec. 30, 1998, No. 96 Civ. 2166 (RPP)], *affd on other grounds* 215 F3d 273 [2d Cir 2000] [concluding that a single shipment of steel plates does not constitute a pattern of racketeering]). As against the Garcia Defendants, the complaint does not allege that they engaged in any specific act of wire or mail fraud.

The complaint also fails to plead facts sufficient to infer defendants' fraudulent intent. To adequately allege fraudulent intent, the complaint "may allege a motive for committing fraud and a clear opportunity for doing so" or "where motive is not apparent ... by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial

allegations must be correspondingly greater" (*Powers v British Vita, P.L.C.*, 57 F3d 176, 184 [2d Cir 1995]). The allegations "must 'provide some minimal factual basis for conclusory allegations of scienter that give rise to a strong inference' of fraudulent intent" (*id.* [internal citation omitted]). The prospect of financial gain, without more, or general assertions that the defendant acting intentionally or knowingly do not satisfy this heightened pleading requirement (*see ABF Capital Mgt. v Askin Capital Mgt., L.P.*, 957 F Supp 1326, 1327 [SD NY 1997]). Plaintiff's conclusory allegations that defendants participated in a scheme do not support the level of conscious behavior necessary to maintain a RICO claim (*see Board of Mgrs. of Beacon Tower Condominium*, 136 AD3d at 685; *Pludeman*, 40 AD3d at 368).

Nor has plaintiff set forth the requisite reliance necessary for mail or wire fraud. The plaintiff must show that "someone – whether the plaintiffs themselves or third parties – relied on the defendant's misrepresentation" (*Sergeants Benevolent Assn. Health & Welfare Fund v Sanofi-Aventis United States LLP*, 806 F3d 71, 87 [2d Cir 2015], *cert denied* 137 S Ct 140 [2016]). Plaintiff has not pled any particularized facts alleging that its former clients relied upon any misrepresentation by defendants which caused them to terminate their retainer agreements.

Lastly, the RICO claim fails because the complaint does not plead that plaintiff sustained an actual, quantifiable injury (*see Kerik*, 64 F Supp 3d at 560]). Plaintiff asserts that its damages include the "loss of potential contingency fees" (NYSCEF Doc No. 22, ¶ 48), but that very phrase signifies that an injury cannot be quantified. Accordingly, the motions seeking dismissal of the sixth cause of action are granted, and the sixth cause of action is dismissed.

G. Seventh Cause of Action for Civil Conspiracy

It is well settled that "New York does not recognize an independent cause of action in tort for conspiracy" (*EVEMeta, LLA v Siemens Convergence Creators Corp.*, 173 AD3d 551, 553 [1st

Dept 2019]). However, a plaintiff may plead a civil conspiracy to connect the defendants' actions where there is an actionable, underlying tort (*Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986]). As such, to plead a cause of action for civil conspiracy, the plaintiff must plead an actionable underlying tort plus "(1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury'" (*Abacus Fed. Sav. Bank*, 75 AD3d at 474, quoting *World Wrestling Fedn. Entertainment, Inc. v Bozell*, 142 F Supp 2d 514, 532 [SD NY 2001]). Because the complaint pleads claims for tortious interference and defamation, the motions seeking dismissal of the seventh cause of action are denied.

H. Eighth Cause of Action for a Permanent Injunction

The eighth cause of action seeks to enjoin defendants from contacting plaintiff's current or former clients (NYSCEF Doc No. 22, ¶ 96). Defendants contend that plaintiff has no substantive claim against them, that plaintiff failed to plead any facts giving rise to present or future violations, and that plaintiff has an adequately remedy at law, namely money damages.

A cause of action for a permanent injunction requires the plaintiff to plead "that there was a violation of a right presently occurring, or threatened and imminent, that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor" (*Aponte v Estate of Aponte*, 172 AD3d 970, 974 [2d Dept 2019] [internal quotation marks and citations omitted]). A permanent injunction is "a drastic remedy granted [only] in a clear case, reasonably free from doubt" (*Standard Realty Assoc., Inc. v Chelsea Gardens Corp.*, 105 AD3d 510, 510 [1st Dept 2013] [internal quotation marks and citations omitted]). Thus, relief is warranted only where no other remedy is available (*see Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596, 597 [1st Dept 2011] [dismissing a claim for a permanent

injunction because a legal remedy, namely monetary damages, was available]; *accord Severino v Classic Collision, Inc.*, 280 AD2d 463, 464 [2d Dept 2001]). Here, the allegations in the complaint are insufficient to warrant the extraordinary relief of barring defendants from any contact with plaintiff's past or current clients or that monetary damages would not suffice (*see Mini Mint Inc.*, 83 AD3d at 597; *Koeppel*, 122 AD2d at 783 [denying injunctive relief where "direct mail solicitation of real estate clients ... constituted constitutionally protected commercial speech"]).

Accordingly, it is

ORDERED that the motion of defendants William Schwitzer, William Schwitzer & Associates, P.C., Giovanni C. Merlino, Barry Aaron Semel-Weinstein and Beth Michelle Diamond (collectively, the Schwitzer Defendants) for dismissal of the complaint (motion sequence no. 001) is granted to the extent of dismissing the second, fourth, fifth, sixth and eighth causes of action, and the second, fourth, fifth, sixth and eighth causes of action are dismissed as against them; and it is further

ORDERED that the cross motion of plaintiff for dismissal of the counterclaim asserted by the Schwitzer Defendants against it (motion sequence no. 001) is granted, and the counterclaim asserted by the Schwitzer Defendants against plaintiff is dismissed; and it is further

ORDERED that the motion of defendants Rene G. Garcia and the Garcia Law Firm (together, the Garcia Defendants) for dismissal of the complaint (motion sequence no. 002) is granted to the extent of dismissing the second, fourth, fifth, sixth and eighth causes of action, and the second, fourth, fifth, sixth and eighth causes of action are dismissed as against them; and it is further

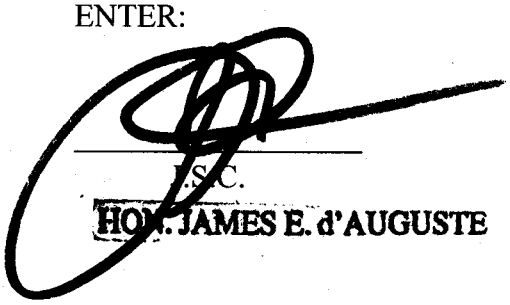
ORDERED that the Garcia Defendants shall serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the motion of defendants Mignolia Pena and Janilda Gomez for dismissal of the complaint (motion sequence no. 003) is granted to the extent of dismissing the second, fourth, fifth, sixth and eighth causes of action, and the second, fourth, fifth, sixth and eighth causes of action are dismissed as against them.

This constitutes the decision and order of this Court.

Dated: November 4, 2019

ENTER:



J.S.C.
HON. JAMES E. d'AUGUSTE